A

KIAN JOO CAN FACTORY BHD & ORS v. SEE TEOW KOON & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
ZALEHA YUSOF JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: W-02(NCC)(W)-2088-12-2015 &
W-02(NCC)(W)-267-02-2016]
12 JULY 2017

C ***COMPANY LAW:*** *Directors – Retirement – Respondent sought for re-election as director – Whether defeated by shareholders' resolution – Whether respondent's removal as executive director illegal, null and void – Whether 2006 court order previously obtained entitled respondent to remain as executive director until the age of 70 – Whether respondent could be appointed as executive director without having first been elected to post of director – Whether respondent's employment as executive* D *director dependent upon his holding or maintaining office as director – Whether cessation of respondent's position as executive director lawful – Issue of quantum – Whether there was justification for imposing costs on indemnity basis – Companies Act 1965, ss. 4, 33, 129 & 131B*

E The first appellant, a public-listed company, had employed the respondent on 1 January 1967. In 1974, the respondent was promoted to the position of director and executive director of the first appellant, which position he held and enjoyed until his removal by the first appellant on 2 May 2014. The respondent was responsible for the day-to-day factory operations of the factories owned by the first appellant and its subsidiaries which included the F second and third appellants. Subsequently, the first appellant sought to impose a retirement age of 55 years for all executive directors including the respondent. The respondent did not agree to this new term of retirement. The first appellant sought to retire the respondent's brother, See Toew Chuan, as managing director of the first appellant on the basis that See Teow Chuan had G surpassed the new retirement age. The respondent and See Teow Chuan then commenced an action in the High Court challenging the appellant's introduction of a new term into their contracts of employment in that they shall retire at 55 years of age. The High Court dismissed their claim. Upon appeal, however, this court held that the respondent was entitled to be H employed until he attained the age of 70 years ('2006 Order'). On 25 January 2012, Can-One International Berhad ('Can-One') acquired 32.9 % of the paid up capital of the first appellant and became the single largest shareholder. At the 2014 AGM of the first appellant, the respondent had retired by rotation and offered himself for re-election as a director of the first appellant. I However, the proposed resolution for his re-election was defeated at the said AGM by a shareholders' resolution. The first appellant notified the respondent by a letter dated 2 May 2014 that following his retirement as

director of the first appellant and his non re-election at the 2014 AGM, his position as an executive director of the first appellant had come to an end. The respondent then filed the instant action claiming that the removal of the respondent as an executive director of the first appellant was illegal, null and void. The High Court allowed the respondent's declarations and awarded a sum of RM8,822,810.72 together with interest and costs on an indemnity basis of RM519,074.82. Two appeals arose against the said decision and judgment of the High Court and both appeals were consolidated and heard together. The issues that arose were, *inter alia* (i) whether the Judicial Commissioner ('JC) was bound by the 2006 Order with respect to the retirement age and that the said order entitled the respondent to remain as executive director until he attained the age of 70; (ii) whether a person could be appointed as an executive director, or remain as an executive director of the first appellant without having first to be elected to the post of a director; (iii) whether the respondent's employment as executive director was conditional upon the holding of office as a director of the first appellant; and (iv) whether there was justification for imposing costs on an indemnity basis.

Held (allowing appeals)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The 2006 Order did not support the respondent's contention of entitlement to be permanently employed until the age of 70. The court did not declare that the respondent was exempted from the provisions of the Companies Act 1965 ('Companies Act') or the articles of association ('articles'). Indeed, the court could not and did not do that. The court did not declare or guarantee permanence in service until age 70 under all circumstances. It must follow that ss. 4 (definition of 'director'), 33, 129 and 131B of the Companies Act, arts. 89, 104, 104A and 105 of the articles of the first appellant and para. 7.26 of the Main Market Listing Requirements ('listing requirements') applied to the respondent with regard to his retirement by rotation as a director and his actions in seeking re-election as a director of the first appellant up to the age of 70. The 2006 Order could not have intended to fetter the exercise of statutory powers by the shareholders in the election or re-election of the directors of the company. (paras 16-18)

(2) The provisions of the Companies Act make no distinction between an executive director and non-executive director. A person occupying the position of a director by whatever name called is a director by definition under the Companies Act. The distinction between an executive director, non-executive director and independent director lies in the roles, functions and capacity of employment. Regardless of the distinction between an executive director, non-executive director and

independent director, they stem and emanate from the position of a director in the first place. The respondent's contention that he can remain as an executive director of the first appellant although no longer a director, therefore, was untenable. (para 25)

(3) The right to re-elect retiring directors of the first appellant was vested upon the shareholders. The composition of the board of directors of a public-listed company, such as the first appellant, was determined by its shareholders in attendance at a general meeting of a company exercising their voting rights attached to their shares. When the shareholders decided that they did not wish to re-elect the respondent as a director of the first appellant, they were in effect saying that they did not wish for the respondent to remain on the board of directors. By extension, they did not wish for the respondent to remain in management by being appointed or remain as an executive director. The respondent's employment as an executive director was thus clearly dependent/conditional upon his holding or maintaining office as a director of the first appellant. As the cessation of the respondent's position as an executive director was lawful, that part of the respondent's claim to the effect that he was entitled to serve as an executive director of the first appellant up until the age of 70 must fail. (paras 30 & 31)

(4) There was no justification for imposing costs on an indemnity basis. As there was no breach of the 2006 Order, the basis for awarding indemnity costs no longer existed. As the respondent himself conceded, it was the shareholders' right not to re-elect him as director. The orders of the High Court, including the order for indemnity costs, were thus set aside and substituted with an order for judgment in favour of the respondent for the sum of RM2,528,536.72 (his total retirement benefit) together with interest of 5% from date of filing of the suit until payment. (paras 37 & 38)

Bahasa Malaysia *Headnotes*

Perayu pertama, sebuah syarikat tersenarai awam, telah mengambil responden sebagai pekerja pada 1 Januari 1967. Pada 1974, responden dinaikkan pangkat sebagai pengarah dan pengarah eksekutif perayu pertama, jawatan yang dipegangnya sehingga penyingkirannya oleh perayu pertama pada 2 Mei 2014. Responden bertanggungjawab bagi operasi kilang yang dimiliki perayu pertama dan subsidiarinya termasuk perayu kedua dan ketiga. Seterusnya, perayu pertama mengenakan umur persaraan pada 55 tahun terhadap semua pengarah eksekutif termasuk responden. Responden tidak setuju dengan syarat baru persaraan itu. Perayu pertama cuba menyuruh abang responden, See Teow Chuan, bersara sebagai pengarah urusan perayu pertama atas dasar bahawa See Teow Chuan melampaui umur

persaraan baharu. Responden dan See Teow Chuan kemudiannya memulakan tindakan di Mahkamah Tinggi membantah kemasukan syarat baharu dalam kontrak pekerjaan bahawa mereka harus bersara pada umur 55 tahun. Mahkamah Tinggi menolak tuntutan mereka. Apabila rayuan dibuat, walau bagaimanapun, mahkamah ini memutuskan responden berhak bekerja sehingga dia mencapai umur 70 tahun ('Perintah 2006'). Pada 25 Januari 2012, Can One-International Berhad ('Can-One') memperoleh 32.9% modal berbayar perayu pertama dan menjadi pemegang saham terbesar. Di AGM 2014 perayu pertama, responden bersara mengikut giliran dan menawarkan dirinya untuk dilantik semula sebagai pengarah perayu pertama. Walau bagaimanapun, resolusi yang dicadangkan untuk pelantikan semula responden tertewas di AGM tersebut oleh resolusi pemegang-pemegang saham. Perayu pertama memberi notifikasi kepada responden melalui surat bertarikh 2 Mei 2014 bahawa berikutan persaraannya sebagai pengarah perayu pertama dan kerana dia tidak dilantik semula di AGM 2014, kedudukannya sebagai pengarah eksekutif perayu pertama telah berakhir. Responden kemudiannya memfailkan tindakan ini dengan tuntutan bahawa penyingkiran responden sebagai pengarah eksekutif perayu pertama adalah tidak sah dan terbatal. Mahkamah Tinggi membenarkan deklarasi responden dan mengawardkan jumlah RM8,822,810.72 bersama dengan faedah dan kos atas dasar ganti rugi RM519,074.82. Dua rayuan timbul terhadap keputusan tersebut dan penghakiman Mahkamah Tinggi dan kedua-dua rayuan digabungkan dan didengar bersama. Isu-isu yang timbul adalah, antara lain (i) sama ada Pesuruhjaya Kehakiman ('PK') terikat dengan Perintah 2006 berkenaan umur persaraan dan bahawa perintah tersebut menyebabkan responden berhak kekal sebagai pengarah eksekutif sehingga mencapai umur 70 tahun; (ii) sama ada seseorang boleh dilantik sebagai pengarah eksekutif, atau kekal sebagai pengarah eksekutif perayu pertama tanpa terlebih dahulu dipilih sebagai pengarah; (iii) sama ada jawatan responden sebagai pengarah eksekutif adalah bersyarat atas pegangan jawatan sebagai pengarah perayu pertama; dan (iv) sama ada terdapat justifikasi untuk mengenakan kos atas dasar ganti rugi.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Perintah 2006 tidak menyokong hujahan responden bahawa dia berhak bekerja sehingga mencapai umur 70 tahun. Mahkamah tidak mengisytiharkan responden dikecualikan daripada peruntukan-peruntukan Akta Syarikat 1965 ('Akta Syarikat') atau artikel-artikel persatuan syarikat ('artikel-artikel'). Mahkamah tidak boleh dan tidak akan berbuat demikian. Mahkamah tidak boleh mengisytiharkan atau

menjamin seseorang itu boleh kekal dalam perkhidmatan sehingga seseorang itu berumur 70 tahun dalam semua keadaan. Harus diikuti bahawa ss. 4 (definisi 'pengarah'), 33, 129 dan 131B Akta Syarikat, per. 89, 104, 104A dan 105 artikel-artikel perayu pertama dan perenggan 7.26 Keperluan Penyenaraian Pasaran Utama ('Keperluan Penyenaraian') harus diguna pakai pada responden berkenaan persaraannya melalui giliran sebagai pengarah dan tindakannya dalam menuntut pelantikan semula sebagai pengarah perayu pertama sehingga mencapai umur 70 tahun. Perintah 2006 tidak berniat menyekat penjalanan kuasa statutori pemegang-pemegang saham dalam pelantikan atau pelantikan semula pengarah-pengarah syarikat.

(2) Peruntukan-peruntukan Akta Syarikat tidak membuat perbezaan antara pengarah eksekutif dan pengarah bukan eksekutif. Seseorang yang memegang jawatan sebagai pengarah dengan apa-apa panggilan pun adalah pengarah melalui definisi bawah Akta Syarikat. Perbezaan antara pengarah eksekutif, pengarah bukan eksekutif dan pengarah bebas terletak pada peranan, fungsi dan keupayaan jawatan. Tanpa mengira perbezaan antara pengarah eksekutif, pengarah bukan eksekutif dan pengarah bebas, ini berpunca dan berasal daripada jawatan pengarah. Hujahan responden bahawa dia patut kekal sebagai pengarah eksekutif perayu pertama walaupun bukan lagi pengarah, dengan itu, tidak dapat dikekalkan.

(3) Hak melantik semula pengarah-pengarah perayu pertama terletak pada pemegang-pemegang saham. Komposisi lembaga pengarah sebuah syarikat tersenarai awam, seperti perayu pertama, ditentukan oleh pemegang-pemegang saham yang hadir di mesyuarat am syarikat bagi melaksanakan hak mengundi yang disertakan dengan saham-saham mereka. Apabila pemegang-pemegang saham memutuskan bahawa mereka tidak mahu melantik semula responden sebagai pengarah perayu pertama, mereka menyatakan bahawa mereka tidak mahu responden kekal dalam lembaga pengarah. Berikutan itu, mereka tidak mahu responden kekal berada dalam pengurusan dengan melantiknya atau mengekalkannya sebagai pengarah eksekutif. Jawatan responden sebagai pengarah eksekutif dengan jelasnya bersyarat atas dia memegang atau mengekalkan kedudukannya sebagai pengarah perayu pertama. Memandangkan pemberhentian jawatan responden sebagai pengarah eksekutif dilakukan mengikut undang-undang, tuntutan responden bahawa dia berhak berkhidmat sebagai pengarah eksekutif perayu pertama sehingga mencapai 70 tahun harus gagal.

(4) Tiada justifikasi untuk mengenakan kos atas dasar ganti rugi. Oleh kerana tiada pelanggaran Perintah 2006, dasar untuk mengawardkan kos ganti rugi tidak lagi wujud. Responden sendiri mengakui bahawa adalah hak pemegang-pemegang saham untuk tidak melantiknya semula sebagai pengarah. Perintah Mahkamah Tinggi, termasuk perintah kos ganti rugi, dengan itu diketepikan dan diganti dengan perintah penghakiman memihak pada responden bagi jumlah RM2,528,536.72 (jumlah sepenuh faedah persaraannya) bersama dengan faedah 5% dari tarikh pemfailan guaman sehingga bayaran.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Brisbane City Council & Anor v. Attorney-General for Queensland [1979] AC 411 ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***
Exeter City AFC Ltd v. Football Conference Ltd and Another [2004] Ch D 1179 ***(refd)***
Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals [2003] 4 CLJ 505 CA ***(refd)***
Grundt v. Great Boulder Proprietary Gold Mines Ltd [1948] 1 All ER ***(refd)***
Henderson v. Henderson (1843) 3 Hare 100 ***(refd)***
In Re Koenigsberg [1949] Ch 348 ***(refd)***
Macmillan Inc v. Bishopsgate Investment Trust plc and Others (No 3) [1995] 3 All ER 747 ***(refd)***
Re Greater Beijing Region Expressways Ltd [1999] 4 HKC 807 ***(refd)***
RHB Capital Bhd v. Tan Sri Dato' Abdul Rashid Hj Mohamed Hussain [2006] 2 CLJ 91 HC ***(refd)***
Russel v. Northern Bank Development Corpn Ltd [1992] 1 WLR 588 ***(refd)***
See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [2007] 2 CLJ 82 CA ***(refd)***
Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors [2006] 1 CLJ 41 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC ***(refd)***
Union Music Ltd and another v. Watson and Another [2003] 1 BCLC 453 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4, 33, 129, 131B, 137(1)
Rules of Court 2012, O. 59

For the appellants - Cyrus Das, Robert Low, James Khong, Helen Lim & Karen Yong; M/s James Khong
For the respondent - R Thayalan & S Thisinayagam; M/s Nayagam & Partners

[Editor's note: See Teow Koon v. Kian Joo Can Factory Bhd & Ors [2016] 1 LNS 375 HC (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] These are two appeals against the decision and judgment of the High Court at Kuala Lumpur given on 4 November 2015 and 21 January 2016 respectively upon the completion of the trial of the action in the High Court. Both appeals have been consolidated and are to be heard together. The High Court had allowed the respondent's declarations sought and awarded a sum of RM8,822,810.72 together with interest and costs on an indemnity basis of RM519,074.82 with interest. Aggrieved with this decision, the appellants appealed to this court.

[2] The appeals were heard on 14 February 2017. After hearing the parties and taking into consideration the written submissions, we allowed the appeals and set aside the orders of the High Court and substituted the same with different orders. Our reasons for doing so now follow.

The Relevant Facts

[3] The salient facts giving rise to the civil suit can be stated as follows. The first appellant was incorporated on 18 March 1958 as a private company limited by shares. It was converted to a public company on 10 September 1984 whose shares are listed and quoted on the Main Market of Bursa Malaysia. The second and third appellants are the wholly owned subsidiaries of the first appellant. As events turned out, a significant change occurred in 2012 when Can-One International Berhad ("Can-One") became the single largest shareholder holding approximately 32.9% of the shareholding by its purchase of shares from the See family.

[4] The respondent was appointed director and executive director of the first appellant on 8 October 1974. He was appointed director of the second appellant on 15 June 1989 and director of the third appellant on 1 July 2000. The first appellant employed the respondent on or about 1 January 1967. In 1970, the first appellant promoted the respondent to the position of factory manager.

[5] In 1974, the respondent was promoted to the position of director and executive director of the first appellant, which position he held and enjoyed until his removal by the first appellant on 2 May 2014. The respondent under his contract of employment with the first appellant as an executive director was responsible for the day to day factory operations of the factories owned by the first appellant and its subsidiaries which included the second and third appellants.

[6] Although the respondent was employed by the first appellant under a contract of employment as an executive director, the first appellant had apportioned the payment of the respondent's salary and remuneration to other profit generating subsidiary companies to defray the tax exposure and to gain tax benefits for the first appellant's subsidiaries, namely the second and third appellants. Under the terms and conditions of the respondent's employment as an executive director of the first appellant, the appellant had ranked the respondent under Job Grade D2 of Kian Joo Group of Companies Terms and Conditions of Employment – Executive Director which was implemented by the first appellant on 31 March 1999 and it was made effective from 1 January 1999 ("HR Package").

[7] The respondent had been enjoying all the terms and conditions of the HR Package save and except on the issue of retirement age which became a point of contention when the first appellant sought to impose a retirement age of 55 years for all executive directors including the respondent. Unsurprisingly, the respondent did not agree to this new term of retirement at 55 years as when he commenced his employment with the first appellant in 1967 and when he was made an executive director in 1974, there was no retirement age applicable to him.

[8] At about the same time, the first appellant had by letter dated 26 April 1999 sought to retire respondent's brother, See Teow Chuan as managing director of the first appellant with effect from 31 May 1999 on the basis that See Teow Chuan has surpassed the new retirement age introduced by the first appellant. The respondent and See Teow Chuan then commenced an action in the High Court challenging the appellant's introduction of a new term into their contracts of employment in that they shall retire at 55 years of age. The High Court dismissed their claim. Upon appeal, this court held that the respondent was entitled to be employed until he attains the age of 70 years (reported as *See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors* [2007] 2 CLJ 82).

[9] As mentioned earlier, on or about 25 January 2012, Can-One acquired 32.9% of the paid up capital in the first appellant and became the single largest shareholder. At the 2014 AGM of the first appellant, the respondent had retired by rotation and offered himself for re-election as a director of the first appellant. However, the proposed resolution for his re-election was defeated at the said AGM by a shareholders' resolution.

[10] By letter dated 2 May 2014, the first appellant notified the respondent that following his retirement as director of the first appellant and his non re-election at the 2014 AGM, his position as an executive director of the first appellant had come to an end on 16 April 2014.

[11] The respondent then filed the instant action claiming that the first appellant's removal of the respondent as an executive director of the first appellant was illegal, null and void as:

(a) The respondent's contract of employment as an executive director of the first appellant was separate and distinct from his position as a director of the first appellant's board of directors.

(b) It was in direct violation of the Court of Appeal order ordering that the respondent shall be entitled to continue working as an executive director of the first appellant until the respondent attains the age of 70 years.

[12] The respondent sought the following primary relief:

(a) Declaratory relief that he is entitled to work as an executive director of the first appellant until the age of 70 years and that his removal as executive director of the first appellant was unlawful, null and void.

(b) Restoration to his position as an executive director without loss of salaries, perks and benefits.

(c) Further or alternatively, the respondent sought payment of various sums alleged to be due to him under the HR Package for executive director upon his attaining the age of 70 years on 14 June 2019.

At The High Court

[13] Although the trial was conducted as a single trial in terms of liability and quantum, the learned JC on 4 November 2015 gave his decision on liability and gave directions for further submissions on quantum and relief to be granted. On 21 January 2016, the learned JC pronounced decision on the relief and quantum. Given the apparent two decisions, the appellants lodged two appeals. The learned JC took exception to this course of conduct by the appellants but, with respect, we do not see how any criticism is warranted as the appellants were merely protecting their position without any ulterior or sinister motive.

[14] In his judgment, the learned JC allowed the claim for retirement benefits in full as sought in that the claim for loss until the age of 70 years was allowed in respect of salaries and contractual bonus. Costs was awarded on an indemnity basis. Other claims of the respondent were disallowed and the respondent has chosen not to appeal on those matters.

The Instant Appeal

[15] Before us, much of the same arguments were canvassed to show that the learned JC was correct or in error in coming to his findings. We find it unnecessary to deal with all the arguments except the ones as follows. The first obvious issue which requires determination pertains to the order of this

court given on 4 October 2006 with respect to the retirement age issue ("2006 order"). The learned JC was of the view that he was bound by this 2006 order and agreed that the said order entitled the respondent to remain as executive director until he attains the age of 70 years and he is entitled to be compensated by reference to that age. For good measure, the learned JC also found that *res judicata*/issue estoppel applied in the wider sense in view of the 2006 order. With respect, we find the views expressed to be untenable.

[16] In this regard, we agree with the appellants that the 2006 order does not support the respondent's contention of entitlement to be permanently employed until the age of 70 years. It was plain to us that this court in arriving at the 2006 order had identified and confined the primary issue upon a narrow finding: namely, on the validity of the 1999 Board Resolution that retrospectively imposed a mandatory retirement age mid-stream. The injunction granted was also upon a qualified and narrow footing. Having found that the said imposition of a mandatory retirement age of 55 years was bad in law, the court then implied a term of 70 years as the mandatory retirement age by reference to s. 129 of the Companies Act 1965.

[17] Significantly, this court there did not declare that the plaintiffs therein (including the present respondent) were thereafter exempt from the provisions of the Companies Act 1965 or the articles of association. Indeed, the court could not and did not do that. The court did not declare or guarantee permanence in service until age 70 under all circumstances as being contended before us. The court also did not say that the first appellant must compute or pay retirement benefits computed until the age of 70 years.

[18] Having determined this issue, it must follow that ss. 4 (definition of "director"), 33, 129 and 131B of the Companies Act 1965, arts. 89, 104, 104A, and 105 of the articles of association of the first appellant ("articles") and para. 7.26 of the Main Market Listing Requirements of Bursa Malaysia ("listing requirements") apply to the respondent with regard to his retirement by rotation as a director and his actions in seeking re-election as a director of the first appellant up to the age of 70 years. The 2006 order could not have intended to fetter the exercise of statutory powers by the shareholders in the election or re-election of the directors of the company (see *Russel v. Northern Bank Development Corpn Ltd* [1992] 1 WLR 588; *Union Music Ltd and another v. Watson and Another* [2003] 1 BCLC 453; *Exeter City AFC Ltd v. Football Conference Ltd and Another* [2004] Ch D 1179 and *Re Greater Beijing Region Expressways Ltd* [1999] 4 HKC 807).

[19] As we had noted earlier, sometime in 2012, there was a significant change in the shareholding of the first appellant company where Can-One, a new entity, had acquired approximately 32.9% of the shareholding of the first appellant and became the single largest shareholder. Accordingly, the members of the See family were repeatedly not re-elected when they retired on rotation as directors. The 2006 order cannot be a restraint on the approximately 32.9% bloc owned by Can-One on who it wishes to vote as its directors of the company in which it has acquired a substantial stake. To be fair, the respondent did not dispute the right of the shareholders voting against his proposed re-election as a director at the first appellant's 2014 AGM. This then gives rise to the question, which we will come back to in a moment, of whether a person could be appointed as an executive director, or remain as an executive director, of the first appellant without having first to be elected to the post of a director.

[20] Having determined the issue of the effect of the 2006 order, it must also follow that *res judicata* and issue estoppel cannot operate against the appellants. It is settled law that *res judicata* operates to bar a party from re-agitating in subsequent proceedings an issue of complaint that has, or could fairly have been disposed of in the earlier proceedings. Where a plea of *res judicata* is raised, it is necessary to identify with precision the issue that was decided or "could have and should have" been decided in the earlier proceedings (see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321; [2001] 4 MLJ 346 applied in *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors and Other Appeals* [2003] 4 CLJ 505; [2003] 4 MLJ 654, *Simpang Empat Plantation Sdn Bhd v. Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41; [2006] 1 MLJ 193, *Henderson v. Henderson* (1843) 3 Hare 100, *Brisbane City Council & Anor v. Attorney-General for Queensland* [1979] AC 411, and *In Re Koenigsberg* [1949] Ch 348).

[21] In the instant case, it is plain that the issues raised here were not raised in the earlier suit and could not have been raised in the earlier suit giving rise to the 2006 order. That suit dealt with the narrow question of the contract of employment of the respondent. The present case is concerned with issues that arose later and deal with the question of whether the contract of employment as executive director of the respondent had come to an end as the platform on which the respondent was so appointed, that is, as a director of the first appellant, no longer existed when the respondent failed to get re-elected as a director of the first appellant.

[22] This brings us neatly to the next question and an important one. The question is whether the respondent's employment as executive director is conditional on holding office as director. The learned JC, in essence, agreed with the respondent's position that the 2006 order entitles the respondent to

remain as an executive director of the first appellant despite him ceasing to be a director of the first appellant. Again we are constrained to hold, with respect, that the learned JC's finding in this respect cannot be sustained.

[23] This issue brings into focus the distinction between an executive director and a non-executive director. In this respect, the Companies Act 1965 does not appear to distinguish between directors. Section 4 of the Companies Act 1965 merely provides that a "director" "includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director". It would appear that this definition is wide enough to include an executive director who nevertheless remains a director in law.

[24] The listing requirements, on the other hand, are more explicit. For example, for corporate accountability purposes, the listing requirements exclude executive directors of a public company from certain roles. Examples of specific paragraphs in the listing requirements which make explicit reference to non-executive directors and executive directors are para. 1.01 which sets out the qualifications of an "independent director". An "independent director" amongst other things is not an executive director of the applicant, listed issuer or any related corporation of such applicant or listed issuer (each one referred to as the said corporation"). Paragraph 15.09(1) (b) provides that all members of the Audit Committee to be non-executive directors with the majority of them being independent directors.

[25] It can therefore be surmised that the provisions of the Companies Act 1965 make no distinction between an executive director and non-executive director. A person occupying the position of a director by whatever name called is a director by definition under the Companies Act 1965. The distinction between an executive director, non-executive director and independent director lies in the roles, functions and capacity of employment. Regardless of the distinction between an executive director, non-executive director and independent director, they stem and emanate from the position of a director in the first place. The respondent's contention that he can remain as an executive director of the first appellant although no longer a director, therefore, seems rather curious and untenable.

[26] In any case, it was common ground that the respondent was appointed as executive director of the first appellant pursuant to art. 89 of the articles of association of the first appellant which provides that the first appellant's directors as amongst them may appoint not less than three and not more than six of their body to be executive directors to exercise all or such powers, authorities and discretions as are by the articles of association expressed to

A be vested in the directors generally. Thus, it is fair to say that the position of an executive director of the first appellant is dependent/conditional upon the holding of office as a director of the first appellant.

[27] It is therefore plain that art. 89 provides for and requires that the executive directors of the first appellant be appointed from among the B directors of the first appellant. One must first hold office as a director of the first appellant before one can be considered or permitted to be appointed as an executive director of the first appellant. Put in another way, if one is not a director of the first appellant, then one could not be appointed as an executive director of the first appellant.

C

[28] It must then follow by logical extension that if an executive director is no longer a director of the first appellant, it would not be permissible to remain appointed or to occupy the position of an executive director of the first appellant. The mandatory platform in which an executive director was so appointed is no longer in existence.

D

[29] Any other conclusion would lead to an untenable position if we consider the following scenario. The board of directors can appoint the maximum allowable executive directors of six (6) in number. Assuming that these directors do not get re-elected at the AGM but go on to contend that they remain as executive directors, the board of directors of the first E appellant cannot then appoint executive directors from among the directors. There may even arise a case where all the executive directors are not members of the board leading to an untenable setting which would neither promote nor achieve reasonable business efficacy as the board of directors would be hamstrung from appointing executive directors.

F

[30] As asserted earlier, the right to re-elect retiring directors of the first appellant is vested upon the shareholders who come from members of the investing public. The composition of the board of directors of a public listed company, such as the first appellant, is determined by its shareholders in attendance at a general meeting of a company exercising their voting rights G attached to their shares. This is, in essence, a propriety right given protection by the listing requirements and the articles of association. When shareholders decided that they did not wish to re-elect the respondent as a director of the first appellant, they are in effect saying that they do not wish for the respondent to remain on the board of directors. By extension, they do not H also wish for the respondent to remain in management by being appointed or remain as an executive director. If the respondent's contention is accepted, it would constitute a fetter on the propriety rights of the shareholders attached to their shares in deciding the persons to manage the affairs of the first appellant.

I

[31] It is also trite that an interpretation or construction should not be given that would amount to re-writing of the first appellant's articles of association (*Grundt v. Great Boulder Proprietary Gold Mines Ltd* [1948] 1 All ER). By reason of the matters stated above, the respondent's employment as an executive director is thus clearly dependent/conditional upon his holding or maintaining office as a director of the first appellant. As the cessation of the respondent's position as an executive director was lawful, that part of the respondent's claim to the effect that he is entitled to serve as an executive director of the first appellant up until the age of 70 years must fail.

[32] Although that would sufficiently dispose of the appeal, there is one last issue which the parties have raised in their submissions which has also been dealt with by the learned JC. The issue is whether s. 137(1) of the Companies Act 1965 would bar the respondent's claim as no shareholder approval, as envisaged by the said s. 137(1), was obtained for payment of compensation for loss of office. We note that s. 137 of the Companies Act 1965 was enacted for the purpose of protecting the interest of shareholders from those in management who may have designs on utilising the company's assets upon retirement as "golden handshakes" (see *RHB Capital Bhd v. Tan Sri Dato' Abdul Rashid Haji Mohamed Hussain* [2006] 2 CLJ 91; [2006] 4 MLJ 80 and Loh Siew Cheang, *Corporate Powers of Accountability*, 2002, Lexis Nexis Butterworths). We do not propose to delve into this issue except to state that we agree with the findings of the learned JC in this regard and with the reasons provided.

[33] We come now to the issue of quantum. In view of our decision on liability, the computation of retirement benefits must be calculated up to the date when the respondent was not re-elected as director of the first appellant, that is, 14 April 2014. For the first appellant, the last drawn salary of the respondent was RM13,892.00. Calculated up to 14 April 2014, his retirement benefit entitlement comes to RM1,098,857.20. As for the second appellant, the last drawn salary of the respondent was RM21,570. Calculated up to 14 April 2014, his retirement benefit entitlement stands at RM1,072,029. As for the third appellant, the last drawn salary of the respondent was RM14,039. Calculated up to 14 April 2014, his retirement benefit entitlement is RM357,670.52. In the circumstances, his total retirement benefit entitlement as set out earlier is RM2,528,556.72.

[34] The last issue concerns the award of indemnity costs by the High Court. The learned JC took into account the deliberate breach of the 2006 order and the lack of *bona fides* in the resolution of the board of directors of the first appellant dated 2 July 2015 which was, as the learned JC observed, intended to stifle the respondent's claim for retirement gratuity, as the main reasons for the award of indemnity costs.

[35] Although the courts have an unfettered discretion to award costs under O. 59 of the Rules of Court 2012, such discretion must be exercised judicially. As was appreciated by the learned JC, an order for indemnity costs is appropriate only in exceptional cases and for exceptional conduct warranting such imposition. Useful assistance in this context can be gained from the observations of Millet J in *Macmillan Inc v. Bishopsgate Investment Trust plc and others (No 3)* [1995] 3 All ER 747, as approved by the Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor (No. 2)* [2010] 1 CLJ 419; [2010] 2 MLJ 181, as follows:

> The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.

[36] We should, however, add that apart from setting out the broad principles in this respect, it would be an arduous task to set out exactly the circumstances justifying an order for indemnity costs due to the myriad of settings that often is the case. It is a matter of discretion by the judge in applying the broad principles to the facts existing in each case.

[37] In the instant case, we find no justification for imposing costs on an indemnity basis. As we have found no breach of the 2006 order, the basis for awarding indemnity costs no longer exists. As the respondent himself conceded, it was the shareholders' right not to re-elect him as director. The question that remained: whether the respondent could then continue as an executive director, was certainly not a frivolous one or raised in bad faith.

Conclusion

[38] In the circumstances, and for the reasons we have provided, the appeals were allowed. The orders of the High Court, including the order for indemnity costs, were set aside and substituted with an order for judgment in favour of the respondent for the sum of RM2,528,536.72 together with interest of 5% from date of filing of the suit until payment. After hearing the parties, and as the respondent had succeeded to some extent, we awarded 1/5 of the costs of RM100,000 which in our assessment would be the appropriate costs the High Court ought to have awarded in the first place. The respondent is accordingly entitled to costs below of RM20,000 subject to payment of allocator fees. For the instant appeals, costs follow the event and are assessed at RM20,000 for both appeals subject to payment of allocator fees. Deposits to be refunded to the appellants.